Supreme Court, U.S.
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97158 6 DEC 2 2 1997
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No. 97-_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

VICKI G. HUFNAGEL, M.D.,

Petitioner,

vs.

MEDICAL BOARD OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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December 30, 1997
(Resubmitted March 20, 1998)
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35 pp

QUESTION PRESENTED

1. Is the Due Process Clause of the Fourteenth Amendment violated by a State statute which denies a physician the right of appeal when a lower court issues a ruling revoking said physician's medical license?

2. Is the Due Process Clause of the Fourteenth Amendment violated when a State statute is retrospectively applied in a case involving a Fundamental Right?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of California are as stated in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Vicki G. Hufnagel, M.D., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of California in this case.

OPINION BELOW

The denial of the Supreme Court of California, of the Petition for Review is reprinted at Appendix (A-1).

JURISDICTION

The denial of the Supreme Court of California was filed on October 1, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

Ca. Business and Professions Code § 2337: "Calendar Preference of Superior Court Review of Action Against License.

Notwithstanding any other provision of law, superior court review of a decision revoking, suspending, or restricting a license shall take preference over all other civil actions in the matter of setting the case for hearing or trial. The hearing or trial shall be set no later than 180 days from the filing of the action. Further continuance shall be granted only on a showing of good cause. **Notwithstanding any other provision of law, review of the superior court's decision shall be pursuant to a petition for an extraordinary writ.**

Cal.Code of Civil Procedure § 904.1: "Appeal From Superior Court

(a) An appeal may be taken from a superior court in the following cases:

(1) From a judgment, except (A) an interlocutory judgment, other than as provided

in paragraphs (8), (9), and (11), (B) a judgment of contempt which is made final and conclusively by Section 1222, (C), a judgment on appeal from a municipal court or a justice court or a small claims court, of (D) a judgment granting or denying a petition for issuance of a writ of mandamus of prohibition directed to a municipal court or a justice court or the judge of judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.

(2) From an order made after a judgment made appealable by paragraph (1).

(3) From an order granting an option to quash service of summons and granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(4) From an order granting a new trial or denying a motion for judgment notwithstanding the

verdict.

(5) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(7) From an order appointing a receiver.

(8) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(11) From an order made appealable by the provisions of the Probate Code or the Family Code.

(12) From an order directing payment of monetary

sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000.00).

(b) Sanctions orders or judgments of five thousand dollars ($5,000) or less against a party or an attorney for ap arty may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ. **Leg.H.** 1968 ch. 385, 1969 ch. 1611, operative July 1, 1970, 1971, ch. 1210, 1978 ch. 395, effective July 11, 1978 ch. 1159, operative July 1, 1984, 1984 ch. 29, 1988 chs. 678, 1199, 1447, 1989 ch. 1416, 1992 ch. 163, operative January 1, 1994, 1993 ch. 456."

SECTION 2403(b) NOTIFICATION

Pursuant to Rule 29.4(c) of the Rules of the United States Supreme Court, Petitioner recites that 28 U.S.C. § 2403(b) may be applicable because the constitutionality of a statute of the State of California is drawn into question and the State of California is not a party.

STATEMENT OF THE CASE

A. Proceedings Below

On September 6, 1977, Appellant was licensed in the State of California as a physician and surgeon. On February 26, 1987, the Medical Board of California filed a formal accusation against Appellant charging her with unprofessional conduct based on her treatment of and billings for thirteen (13) patients. After an administrative hearing was held, the Board issued its decision to revoke Appellant's license to practice medicine. The Board's decision to revoke Appellant's license was effective September 13, 1989.

On October 4, 1989, Appellant filed a Petition for Writ of Mandate and Application for a Stay. The requested stay was granted.

On May 18, 1990, the Honorable David Yaffee, Judge of the Superior Court, granted Appellant's writ in part. On September 26, 1990, the Superior Court entered its Minute Order Granting Petition for Writ of Mandate.

On October 17, 1990, Appellant filed a Notice of Appeal. On November 6, 1990, the Medical Board of California filed its notice of cross-appeal of the judgment granting the writ in part.

On June 23, 1994, the Court of Appeal reversed and remanded the matter to the trial court with directions. In his

decision, the appellate court remanded to the trial court for the trial court to exercise its independent judgment as to whether the Medical Board of California's findings were supported by the weight of the evidence, and also directed the trial court to redetermine whether the Medical Board of California's decision was supported by the totality of appropriately supported findings. (The Court of Appeal's Disposition Order is included in the Appendix, A-2 to A-36.)

On July 30, 1994, Appellant filed a Petition for Review with the California Supreme Court. On September 7, 1994, the California Supreme Court denied Appellant's Petition for Review. The case was remanded back to the trial court to review the Board's findings which had not previously been reviewed. (Remittitur Notice by the Court of Appeal, Appendix, A-37.)

On June 7, 1996, the Superior Court denied Appellate's Writ of Mandate by Minute Order. (Minute Order, Appendix, A-38 to A-41.) The trial court entered its Judgment and Statement of Decision on September 3, 1996 (Appendix, A-45 to A-46).

On September 10, 1996, Appellant filed her Notice of Appeal with the Court of Appeal of the State of California, Second Appellate District, Division 5 (Appendix, A-47 to A-48).

On or about May 8, 1997, Respondent Medical Board of California filed its

Motion to Dismiss Appeal on the grounds that California Business & Professions Code § 2337 allowed relief only through a petition for extraordinary writ, and not by way of appeal. Appellant opposed the Medical Board's Motion to Dismiss; however, the Court of Appeal of the State of California, Second Appellate District, Division 5, issued its Dismissal Order on June 6, 1997 (Appendix, A-49 to A-50).

On June 16, 1997, Appellant filed her Petition for Writ of Mandamus with the California Supreme Court, seeking a direction to the trial court that it comply with the Court of Appeal decision of June 23, 1994. Said petition was denied on October 1, 1997. (Appendix, A-1.)

REASONS FOR GRANTING THE WRIT

The sole issue presented here is the constitutionality under the Fourteenth Amendment of a California state statute, to wit, Business and Professions Code § 2337, which denies a physician his or her due process right to appeal a superior court decision **revoking** said physician's long-held medical license.

First, California Business and Professions Code § 2337 should be struck down as prima facie unconstitutional. On its face, § 2337 states that: "Review of the [California] superior court's decision shall be pursuant to a petition for an extraordinary writ." This language

effectively deprives a physician of his or her right to appeal a lower court ruling, especially egregious in light of the fact that such ruling may virtually end a physicians' career.

Second, as herein applied, California Business and Professions Code § 2337 is unconstitutional because of its retrospective application where a vested right is concerned. This proposed deprivation of appellant's vested property right in her medical license cannot be overstated.

The California Court of Appeal reviewed the instant matter and remanded back to a California superior court with directions. It is the superior court's failure to follow the directive of the California Court of Appeal that appellant is, essentially, appealing from. Because of the severity of the penalty--complete revocation of a medical license--appellant is entitled to a full review on the merits in this case.

If allowed to stand, California Business and Professions Code § 2337 sets a frightening precedent. Even the title of the section--**Calendar preference of superior court action against licensee**--gives no clue that the final sentence of said section effectively strips away a physician's due process right to appeal a superior court decision revoking his or her medical license. Instead, said physician's sole remaining remedy is to petition for an extraordinary writ, an effort which can be summarily denied, thus

ending, forever, a physician's career.

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS VIOLATED BY CALIFORNIA BUSINESS AND PROFESSIONS CODE § 2337 WHICH DENIES A PHYSICIAN THE RIGHT OF APPEAL OF A LOWER COURT DECISION REVOKING, SUSPENDING, OR RESTRICTING SAID PHYSICIAN'S MEDICAL LICENSE.

The basis for petitioner's Petition for Writ of Certiori is best summarized by California Supreme Court Justices Lucas and Mosk: "...The right to a written opinion with reasons stated was enshrined in the Constitution to avoid just this kind of unseemly consequence." Powers v. City of Richmond (1995) 10 Cal.4th 85. dissent by Justices Lucas and Mosk at page 113. The "unseemly consequence" in this instance is the complete revocation of Dr. Hufnagel's medical license, without a written opinion detailing the reasons therefor.

In California, Code of Civil Procedure § 904.1 codifies the general list of appealable orders and judgments. American Alternative Energy Partners II v. Windridge, Inc. (1996) 42 Cal.App.4th 551, 556-557, 49 Cal.Rptr.2d 686, 689. It is within this broad list of appealable cases that the facts of appellant's underlying case belong. Instead, pursuant to the terms of the newly enacted Business and Professions Code § 2337, petitioner is denied her statutory right of appeal and

left only with the right to petition for an extraordinary writ.

Petitions for extraordinary writs are statutorily classified as "special proceedings" rather than ordinary civil actions. California Code of Civil Procedure § 1063, et seq. A final judgment in a "special proceeding" is a final determination of the parties' rights. California Code of Civil Procedure § 1064. Hence, such judgments are immediately appealable unless otherwise specified by statute. Knoll v. Davidson (1974) 12 Cal.3d 335, 343, 11 Cal.Rptr. 97, 101-102.

A petition to a superior court in California for a writ of mandamus initiates a "special proceeding." California Code of Civil Procedure § 1067, et seq. Petitioner herein, Dr. Vicki Hufnagel, made such a petition to a California superior court on October 4, 1989. As such, a judgment order granting or denying such petition would be generally appealable. Bloom v. Municipal Court (1976) 16 Cal.3d 71, 74-75, 127 Cal.Rptr. 317-319; Elmore v. Imperial Irrigating Dist. (1984) 159 Cal.App.3d 185, 190-191, 205 Cal.Rptr. 433, 437-438; Haight v. City of San Diego (1991) 228 Cal.App.3d 413, 416, 278 Cal.Rptr. 334, 336 Fn. 3.

In California, an appeal may also be taken from an order after an appealable final judgment pursuant to California Code of Civil Procedure § 904.1(a)(2). An appealable post-judgment order must

satisfy three requirements: The underlying judgment must be final in the trial court; the issues raised by appeal must be different from those arising from the judgment itself; and the order must affect or relate to the underlying judgment by enforcing it or staying its execution. Lakins v. Watkins Assoc. Industries (1993) 6 Cal.4th 644, 651-652, 25 Cal.Rptr.2d 109, 113 and Fn. 3. These requirements are met with the underlying superior court judgment and, thus, such superior court judgment should be appealable in California.

More important, perhaps, than appellant's argument as to appealable orders in California is the misleading title of California Business and Professions Code § 2337 itself. The title indicates only that superior court reviews of actions against licensees will be given **calendar preference** and not that review of such decisions shall be limited to a petition for extraordinary writ. To deny physicians the right of appeal flies in the face of long-held California authority. Again, as noted by dissenting Justices Lucas and Mosk in Powers v. City of Richmond (1995) 10 Cal.4th 85:

> "The lead opinion concedes, as it must, that starting with our earliest decision, we have repeatedly construed our 'appellate jurisdiction' provision as guaranteeing a 'right of appeal.' Neverthe-

less, it insists that in so stating, we actually meant no more than that litigants have 'a right to appellate review generally' (lead opn., ante at page 853 of 40 Cal.Rptr.2d, page 1174 of 893 P.2d)--a right that the lead opinion appears to believe would be satisfied by affording litigants a mere opportunity to seek discretionary writ review. The case holdings, however, are not susceptible to such revisionism. In each relevant decision, and without a single dissent, we found or confirmed the existence of a constitutional 'right of appeal' in matters within this court's appellate jurisdiction. Nowhere in any case is there a hint to support the proposition that the constitutional 'right of appeal' may be satisfied merely by affording a litigant an opportunity to petition for discretionary writ review, and that the 'right to appeal' does not entail guaranteed review on the merits and a written opinion.

* * *

To its credit, the concurring opinion expressly declines to endorse the lead opinion's broad constitutional analysis, and cautions that the legislature may not have

constitutional authority to foreclose appeal--i.e., a right to review on the merits and a written opinion--in favor of discretionary and potentially summary writ review in matters outside the context of the PRA. Significantly, the concurring opinion does not join in the lead opinion's analysis of the 1849 and 1879 constitutional debates and the case law interpreting the resulting provisions. Indeed, it carefully avoids suggesting that when the delegates and justices of this court repeatedly used the phrase 'right of appeal,' they contemplated a right that would be satisfied by the mere opportunity to seek discretionary and potentially summary writ review.

* * *

Moreover, the lead opinion's conclusion creates a special anomaly. Under its discretionary theory, plaintiffs had a general 'writ law'--based right to merit review when they earlier sought discretionary writ relief in the Court of Appeal. But because the lead opinion erroneously ignores the second aspect of plaintiff's constitutional claims (their right to a written opinion) neither plaintiffs, nor this

court, can know whether plaintiffs actually received the merit review to which they are entitled, or, just as important, whether the Court of Appeal's merit review (assuming it occurred) was legally correct. Plaintiffs in this and future cases are implicitly told to simply trust that the Court of Appeal has engaged in, and will engage in, legally correct merit review. As explained above, the right to a written opinion with reasons stated was enshrined in the Constitution to avoid just this kind of unseemly consequence.

In summary, the lead opinion would allow the legislature to transform this court and the courts of appeal into writ courts exclusively, so long as the power of the courts is not significantly impaired--a caveat that under the lead opinion's analysis, affords no protection for litigants' rights. As noted above, under the lead opinion's analysis, there is no principled reason why this rule would not apply even to defendants convicted of capital crimes. Moreover, under the lead opinion's analysis, the same rule would apply to all civil litigants. Accordingly, neither a defendant ordered to pay damages in a contract

> dispute, nor a defendant ordered to pay punitive damages, nor a plaintiff's meritorious civil rights claim erroneously rejected, nor a governmental entity ordered to disclose documents under the PRA, would have a constitutional right to appeal the adverse judgment of the superior court. We should reject this radical position and conclude, in light of the foregoing history and case law, that Article 6, § 11 [of the California Constitution] grants a constitutional right to review on appeal--i.e., review on the merits and a written opinion--of judgments that arise from the original jurisdiction of the superior court."

(Emphasis added.)

It is frightening indeed, a thought echoed by dissenting California Supreme Court Justices Lucas and Mosk, that a litigant's constitutional right to appeal can be stricken by statute. California Business and Professions Code § 2337 is unconstitutional on its face and should, accordingly, be struck down.

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II. CALIFORNIA BUSINESS AND PROFESSIONS CODE § 2337, AS HERE APPLIED, IS UNCONSTITUTIONAL BECAUSE IT IS RETROSPECTIVELY APPLIED WHERE A FUNDAMENTAL RIGHT IS INVOLVED.

Appellant's appeal was filed on October 17, 1990. On November 6, 1990, the California Medical Board filed its notice of cross-appeal of the judgment granting the writ in part. Accordingly, in late 1990, the California Court of Appeal acquired jurisdiction of this matter pursuant to California Code of Civil Procedure § 904.1, et seq.

California Business and Professions Code § 2337 was enacted effective January 1, 1996. Therefore, its application to the case at bar is retrospective. The Court of Appeal of the State of California, Second Appellate District, Division 5, granted the dismissal motion of the Medical Board of California, in part, based on Tapia v. Superior Court (1991) 53 Cal.3d 282, 288-289.

> "There remains of what the term 'prospective' and 'retrospective' mean. Tapia [plaintiff] argues that a law is being applied retrospectively if it is applied to the prosecution of a crime committed before the law's effective date. For some types of laws, the test which Tapia proposed is clearly appropriate. Certainly, a law is retrospective if it clearly

> defines past conduct as a crime, increases the punishment for such conduct, or eliminates a defense to a criminal charge based on such conduct. Such a law, as applied to a past crime, 'change[s] the legal consequences of an act completed before [the law's] effective date' namely the defendant's criminal behavior. (Weaver v. Graham (1981) 450 U.S. 24, 31 [67 667 L.Ed. 2d 17, 24, 101 Sup.Ct. 960]; see also, People v. Weidert (1985) 39 Cal.3d 836, 851 [218 Cal.Rptr. 57, 705 P.2d 380], quoting Weaver v. Graham, supra; cf. Aetna Casualty, supra, 30 Cal.2d at p. 394 [a law is retrospective if it changes] the legal effects of past events'].) Application of such a law to pass crimes would also violate the constitutional rule against expos facto legislation." Tapia v. Superior Court of Tulare County, 53 Cal.3d 282, at 288.

The Tapia court went on to suggest that this proposed test was not appropriate for laws which address the conduct of trial which has yet to take place, rather than criminal behavior which has already taken place. Tapia, 53 Cal.3d at 288. Thus, the California Court of Appeal, Second Appellate District, Division 5, based its dismissal motion on

Tapia, apparently concluding that Business and Professions Code § 2337 addressed the conduct of trials which had not yet taken place.

The conduct in question in the instant case had begun long before the Notice of Appeal was filed by appellant on September 10, 1996. In fact, the appeal process had begun with the filing of appellant's Notice of Appeal on October 17, 1990, some six (6) years before the 1996 appeal and over five (5) years before the enactment of California Business and Professions Code § 2337. The sequence of events is as follows:

1) On October 17, 1990, Appellant Vicki Hufnagel, M.D., first appealed from the superior court ruling;

2) On November 6, 1990, the Medical Board of California filed its notice of cross-appeal of the superior court judgment granting the writ in part;

3) As a result of these appeals, the Court of Appeal of the State of California, Second Appellate District, Division 5, issued its ruling on June 23, 1994;

4) The result of the Court of Appeal ruling was a Remittitur Notice dated September 26, 1994, reversing and remanding back to the superior court with directions;

5) On June 7, 1996, the superior court issued its Minute Order upholding

the penalty of revocation;

6) On July 23, 1996, the Superior Court of the State of California for the County of Los Angeles for the County of Los Angeles issued its Statement of Decision;

7) On September 10, 1996, Appellant Vicki Hufnagel, M.D., filed her Notice of Appeal, appealing from the superior court order on the ground that the superior court had failed to follow the directions of the California Court of Appeal on remand.

This matter again came before the trial court for redetermination on June 7, 1996. In the course of the redetermination, the Medical Board of California had the responsibility for lodging the administrative record with the trial court. The record of the hearing verified that this was not done in time to reach the judge. The record of the hearing, quoted below, verifies that this was not done in time to reach the judge until the day before the hearing. As a consequence, the trial court admitted that it had not had an opportunity to review the entire record. Further, the Medical Board of California filed a late lodging of Administrative Record. During the course of June 7, 1996 hearing (Appendix, A-19 to A-24), petitioner's attorney specifically referred to these improper and late filings as follows:

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BY MR. FRISENDA:

"Your Honor, we had received on June 4, 1996, respondent's Notice of Lodging of Administrative Record. That apparently was just lodged by respondent with the court. I understand that respondent has also with the court various excerpts which I have not received.

THE COURT:

Well, the respondent has certainly been delinquent in assisting the court. The respondent has filed something called Declaration of Gloria A. Barrios In Support of Respondent's Opposition to Brief. It was filed yesterday after I had worked the matter up and formulated the tentative. So, it was, of course, no use at all to me in doing that, and I have not read or considered this mountain of paper that was just given to the court yesterday."

(Appendix, A-51 to A-81.)

As can be readily seen, the California Superior Court below stated that it reviewed only the transcripts of proceedings containing the testimony of two doctors. The court acknowledged that it did not review the Petition for Reconsideration filed by Dr. Hufnagel at

the administrative level, and denied petitioner's Request for Judicial Notice (Appendix, A-82 to A-102) as outside the scope of remand from the California Court of Appeal. This Request for Judicial Notice related to judicial proceedings exonerating Dr. Hufnagel that had been concluded after the original trial court's review as to some of the patients referred to in the findings to be reviewed. Of course, this was of great importance to the matter at hand and should have been taken into consideration by the court. Then, instead of sanctioning the Medical Board for its conduct and continuing the matter to allow an opportunity to adequately review the record and truly exercise independent judgment, the court simply issued it Minute Order and, followed by its Statement of Decision on July 23, 1996.

Accordingly, as can be seen, this matter was a continuing one, running from the original October 17, 1990 appeal through the September 23, 1996 appeal, since Petitioner Vicki Hufnagel, M.D. was appealing from the trial court's failure to follow the specific directions of the Court of Appeal on remand. When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and must be followed. Any material variance from the direction is unauthorized and void. Hampton v. Superior Court (1952) 38 Cal.3d 652, 655, 656; In re Candace P. (1994) 24 Cal.App.4th 1128, 1131; Franklin v. Four Star Int'l, Inc. (1980) 104 Cal.App.3d

897, 902.

Further, it is well established that a failure to follow appellate directions can be challenged on appeal from the subsequent judgment or order. Hampton v. Superior Court (1952) 38 Cal.3d at 656.

The court in Hampton held in pertinent part as follows:

> "When there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void. Rice v. Schmidt, 25 Cal.2d 259, 153 P.2d 313; Weaver v. San Francisco, 146 Cal. 728, 81 P.119; Barnhart v. Edwards, 128 Cal. 572, 61 P. 176; Keller v. Lewis, 56 Cal. 466; Kramer v. Superior Court, 35 Cal.App.2d 239, 95 P.2d 158.
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> * * *
>
> The order of the appellate court, as stated in the remittitur is 'decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the

filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.' [Citations omitted]

* * *

A trial court may not exceed the specific directions of a court of review in remanding a cause after the reverse of a judgment of appeal and add thereto conditions which it assumes the reviewing court should have included. [Citations omitted]

* * *

Nor does the availability of an appeal, were the cause to proceed to final judgment, bar resort to the writ. It may be conceded that an appeal would lie from the final judgment were the superior court allowed to proceed with a further trial of the action."

As can be seen, Petitioner Vicki Hufnagel, M.D.'s appellate proceed began in October of 1990, when she first appealed from the superior court order. It has been a continuing process, from the October 17, 1990 Notice of Appeal to the September 23, 1996 Notice of Appeal, when

Petition Vicki Hufnagel, M.D., **appealed from the superior court's failure to follow the specific directions of the Court of Appeal on remand**. To now allow California Business and Professions Code § 2337 to apply to the case at bar would be to allow a retrospective application of said statute, an application which is unconstitutional when it deprives a person of a vested right.

The right of a properly qualified and licensed individual to practice a particular branch of the healing art, like the right to practice any other profession, is a valuable property right, in which a person is entitled to be protected and secured. Hewitt v. State Board of Medical Examiners (1940) 148 Cal. 590, 84 P.39. In Laisne v. California State Board of Optometry (1942) 19 Cal.2d 831, 123 P.2d 547, the Supreme Court of California explicitly found the right to practice optometry was a vested property right. Indeed, the California Court of Appeal, which heard this matter below, concurs, as is shown by its note in Court of Appeal decision dated June 23, 1994, which states:

> "The trial court's review of the evidence **in a case as this** where a fundamental vested right is at issue ..." Court of Appeal of the State of California, Second Appellate District, Division 5, Decision dated June 23, 1994, at page 19, citing Kearl v. Board of Medical Quality Assurance (1986) 189

Cal.App.3d 1040, 1052.

> Accordingly, the retrospective application of California Business and Professions Code § 2337 is unconstitutional, **as here applied**, because it deprives petitioner of a vested right. See, e.g., Rosefields Packing Company v. Superior Court (1991) 4 Cal.2d, 122.

This proposed deprivation of Petitioner Vicki Hufnagel's vested property right in her medical license cannot be overstated. In the instant case, the superior court below failed to follow the directive of the California Court of Appeal; accordingly, petitioner clearly has a right of appeal. Because of the severity of the penalty -- the career ending revocation of her medical license -- petitioner is entitled to a full review on the merits of this action.

CONCLUSION

For the foregoing reasons, California Business and Professions Code should be deemed unconstitutional; or, in the alternatively, the application of California Business and Professions Code § 2337 to the case at bar should be deemed unconstitutional because it effectively allows a retrospective application of the statute, an application which is prohibited when a fundamental vested right is involved.

Dated: March 12, 1998

Respectfully submitted,

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By _____
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